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No. 666

In the Supreme Court of the United States

OCTOBER TERM, 1960

O. L. DAILEY, JR., ROY FINCH, JR., AND JAMES C. DAVIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1961. The petition for a writ of certiorari was filed on January 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an order under Rule 40, F.R. Crim. P., for the removal of a prisoner from the district where arrested to the district where indicted is an appealable order.

2. Whether, in a removal proceeding, the District Court sitting in the district of arrest has authority to inquire into the competency of the evidence to support the indictment returned by a grand jury in another district and to order production of the grand jury minutes.

STATUTES AND RULE INVOLVED

Rule 40(b)(3) provides in pertinent part:

> * * * If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prose-

cution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

28 U.S.C. 2253 provides in pertinent part:

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

* * * *

STATEMENT

Petitioners and others were indicted by a grand jury in the United States District Court for North Dakota on 33 counts charging use of the mails in execution of a scheme to defraud. Petitioners were subsequently arrested in Arkansas, on November 14, 1960. Although not denying that they were the persons named in the indictment, they resisted removal on the ground that the North Dakota indictment was based on incompetent testimony. In particular, they argued that 22 of the 33 counts were based on mailings that occurred before they became associated with the corporations named in the indictment. They also

requested that the Arkansas court order production of the minutes of the North Dakota grand jury. The Arkansas court refused to undertake any inquiry into the facts underlying the indictment. Upon production of a certified copy of the indictment and of proof that petitioners were the persons named, the court entered an order of removal.

Petitioners noted an appeal to the Court of Appeals for the Eighth Circuit, which considered the merits of their contention (Pet. App. A) and thereafter dismissed the appeal as frivolous.

ARGUMENT

1. Petitioners have already received more consideration than was their due, since their appeal should have been dismissed for lack of jurisdiction. An order of removal is not a final order and is therefore not appealable under 28 U.S.C. 1291. *Meltzer* v. *United States*, 188 F. 2d 916 (C.A. 9), and cases there cited. Before 1938, orders of removal could be tested by filing a petition for a writ of habeas corpus and then appealing from the denial of the petition. In 1938, however, Congress enacted the provision (Act of June 29, 1938, c. 806, 52 Stat. 1232) now incorporated in 28 U.S.C. 2253, *supra*, declaring that there shall be no right of appeal in habeas corpus proceedings brought "to test the validity of a warrant to remove, to another district * * * a person charged with a criminal offense against the United States * * *."[1]

[1] If a court should act beyond its power, a remedy by mandamus would presumably be available.

2. The holding of the court below that the district court properly refused to inquire into the probable cause for the North Dakota indictment or to order production of the minutes of the North Dakota grand jury is clearly correct. Rule 40 specifically provides that, if the prosecution is by indictment, "a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment." The notes of the advisory committee explain the reason for making a distinction between the situation where removal is after indictment (so that production of the indictment is enough) and where removal is before indictment (where probable cause must be shown) as follows:

> * * * The distinction is based on the fact that in case of an indictment, the grand jury, which is an arm of the court, has already found probable cause. Since the action of the grand jury is not subject to review by a district judge in the district in which the grand jury sits, it seems illogical to permit such review collaterally in a removal proceeding by a judge in another district.